

S05E05: Reimagining Legal Frameworks: Protecting Native American Sacred Sites and Sovereignty, an Interview with Michael McNally.

Jordan Loewen-Colón (00:00:07):

Hello, and welcome to the Mapping the Doctrine of Discovery Podcast. The producers of this podcast would like to acknowledge with respect the Onondaga Nation, fire keepers of the Haudenosaunee, the indigenous peoples on whose ancestral lands Syracuse University now stands, and now introducing your hosts, Phil Arnold and Sandy Bigtree.

Philip P. Arnold (00:00:31):

Welcome back to Mapping the Doctrine of Discovery. My name is Philip Arnold. I'm faculty in religion at Syracuse University and core faculty in Native American Indigenous studies.

Sandy Bigtree (00:00:43):

And I'm Sandy Bigtree, a citizen of the Mohawk Nation up at Akwesasne. And also on the board for the American Indian. No, and I'm also on the board for the Indigenous Values Initiative.

Philip P. Arnold (00:01:00):

Right. And we're grateful to be able to bring this interview to you today thanks to Henry Luce Foundation grant. We're very pleased today to have an old friend and a guest, Michael McNally. Michael and I have known each other for decades, worked in Native American studies, and we're coming to you from sunny San Diego and the AAR meeting here. Michael, thanks for coming, and why don't you introduce yourself?

Michael McNally (00:01:41):

Sure. I'm Michael McNally. I teach in the religion department and I'm director of American Studies at Carleton College in Minnesota on lands of the Mdewakanton Dakota Nation. And I'm happy to be here. And we're not just in San Diego, but we're on something like the 26th floor looking out over the harbor. And it's a beautiful day and we're happy to be inside talking.

Philip P. Arnold (00:02:06):

Yes, absolutely.

Sandy Bigtree (00:02:09):

S05E05: Reimagining Legal Frameworks: Protecting Native American Sacred Sites and Sovereignty, an Interview with Michael McNally.

It's very beautiful today, but at night time that battleship out there is lit with a Christmas tree and all kinds of colorful lights.

Philip P. Arnold (00:02:18):

It's a little disconcerting.

Sandy Bigtree (00:02:21):

So now let's talk about the Doctrine of Discovery.

Philip P. Arnold (00:02:26):

So Michael, I love your book *Defend The Sacred*. Maybe you could tell us a little bit about that, and kind of the relationship between religion, law, Native American Religious Freedom Act, those kinds of things that you were trying to accomplish in the book. And then we can talk about what has happened since then since your book was published in 2020.

Michael McNally (00:02:55):

2020.

Philip P. Arnold (00:02:56):

Yeah. And I think it was very influential at the time. So maybe we could start there as a way of framing Doctrine of Discovery, what that means for you.

Michael McNally (00:03:07):

Yeah, sounds good. So, the book is entitled *Defend the Sacred*, and the subtitle is as important as the title. The subtitle is *Native American Religious Freedom Beyond the First Amendment*. And the title comes from the famous banner that was paraded around the Standing Rock Protest/ceremonial camps to the Dakota Access Pipeline. And the title is citational, because even though the Standing Rock movement was not overtly religious or would be reductive to make it religious, the Register of the sacred was what galvanized the movement. And I think encapsulated what was really moving about that movement for a broad American public, maybe not everybody, but a broad American public. And I thought that was really interesting that even though the Dakota access protest litigation lost, there was one modest victory, but they lost in a religious freedom effort to shut down the crossing in the Missouri River.

Michael McNally (00:04:38):

And the title kind of encapsulates what the book is about. Which is in some ways the bankruptcy of religious freedom discourse for the protection of native sacred places. But on the other hand, the power of the language of the sacred to generate allies and to ... So, what might be legally bankrupt in court still has legs and force. And one of the ways that in the research for the book that really came through, one of the core chapters of that was, work that was mentored by our mutual friend Suzan Shown Harjo, who through her career, even before she went to DC to be President Carter's American Indian Congressional liaison in the domestic policy staff. She had been centrally involved with the major statutory gains, the American Indian Religious Freedom Act, which President Carter signed into law in 1978. The Native American Graves Protection Repatriation Act of 1990. And the native, I'm sorry, the National Museum of American Indian Act of 1989, which predated and cleared the ground for NAGPRA.

Michael McNally (00:06:12):

And I was really struck by how the language of religion and language of religious freedom enabled native nations and advocates led significantly by Suzan Shown Harjo, your mentor, Oren Lyons and others, to get these really incredible statutes passed by a settler colonial Congress on behalf of less than 2% of the population. And so, where the language of religious freedom has failed in courts to protect sacred places, it's been really powerful in advancing an agenda.

Michael McNally (00:07:03):

And so, I look at that kind of doubleness there. And that's sort of what, on the one hand what the book is about. And another way that I think about the book, since we've been teaching in this space for a really long time, we've probably consistently taught that the language of religion doesn't really work well for indigenous traditions.

Philip P. Arnold (00:07:29):

Right.

Michael McNally (00:07:30):

And in a way, this book follows that definitional problem into the law. So a reader might say, "So what. So why bend native claims into the language of religion if it's so kind of laden with colonialism?" Which it is.

Philip P. Arnold (00:07:50):

Of course.

Michael McNally (00:07:51):

And there's probably a good reason for that caution and that concern. And I'm not a lawyer, but I took a couple of law school classes to train for this book. And one of the things that I learned in the civil procedure class, was when lawyers look even at a set of rules, they don't look and read it for what it means. They read it for what it can mean, what it might mean, how far they could stretch the language of a given rule or a statute or whatever.

Michael McNally (00:08:23):

And then the courts, of course, evaluate whether a meaning can be wide, they can narrow the meaning the courts as interpreters of the law and so forth. So, that kind of insight, what can religious freedom law mean, is what informs the book. So while I'm surrounded at the American Academy of Religion by scholars who understandably see the limits of religious freedom discourse, the way that it's exported as part of American imperialism abroad, I sort of try to contribute to that conversation by listening to the voices of a Suzan Harjo who is completely aware of the colonial nature of religion and religious freedom, but has used it strategically. And you don't want to say native folks who engage the language of religious freedom were kind of dupes, because they're smart people, right?

Philip P. Arnold (00:09:37):

Yeah, no, that's true.

Sandy Bigtree (00:09:37):

Well, if you're talking about Christianity, it is this religion of law, because you're doomed to hell and damnation if you don't abide by these stringent dictates of how to live in the world. And it's always this dichotomy of good over evil, so it also involves war and fighting and oppression. When you try to superimpose that in courts of law, it fits nicely because law is constructed of all these rules and regulations. But when you're talking to indigenous people, the indigenous peoples of this land had a form of democracy that was about relationships to the natural world.

Sandy Bigtree (00:10:30):

It was not natural law by any measure because that clearly does not exist in the natural world. It's all relational. So, that's why it's really using the terminology sacred that uncovers a whole new interpretation of religion, working with native people, traditional native people, not the BIA chiefs that have already gone through the boarding school experience and they've been Christianized and groomed to be the tribal leaders that the United States will recognize. And the only tribal leaders the United States will recognize, well then they're going to fit in that context too. But we're talking about traditional native people on this land who still understand the importance of building proper relationships with the natural world. So we're talking about two different galaxies here. And if we're going to communicate clearly the colonizers were missing this point. Because they were coming here to acquire wealth and resources, and part of that agenda was Christianizing native people and then deeming them the tribal leaders so they could manipulate them honestly. So, we're entering now where we're starting to question these terms, and it's the only way we're going to crack open a new future for all of us.

Philip P. Arnold ([00:12:08](#)):

I wanted to follow up a little bit on that because one of the things that I think captivated so many people around the world really about Standing Rock was the simplicity of the message. And that water is sacred, water is life, those kinds of, they're not slogans, they're just statements of fact, biological fact. And who could argue with it really? And of course us being in religion, being trained in religion, we recognize that as simply a powerful universal truth if you like. I mean, I don't use truth in a kind of faith-based way, but a kind of biological fact. And I think that's why even though like you say they lost the legal battle, they sort of won a kind of cultural status war, or not a war, but a kind of realization around the world that this is true. And people were attracted to that. There Were works of art that came out of there.

Philip P. Arnold ([00:13:27](#)):

People, various artists, native artists, just sort of captivated that movement in a certain way. I mean, I think I agree with you, the legal terrain is kind of one aspect of it. Then there's a kind of movement in religion maybe, or a movement among people who are sensitive to religion that was a success.

Michael McNally ([00:13:58](#)):

Yes, for sure. And then, I mean, the success in terms of the broad global public understanding, it was like the focal point of attention for a while for the globe. And for folks for whose, for Lakota and Dakota folks for who that is their homeland, as well as for anyone who visited and stayed at the camps, it was also this place of religious generativity. It wasn't sort of a last stand for native religious pasts. It was a generative place for indigenous religious futures.

Michael McNally ([00:14:45](#)):

And those futures aren't done in by a loss in court. In fact, that's one of the things that I sort of feel like I didn't say enough in a book that reads a lot of case law and tries to examine why native claimants lost in court cases. And the point is that for native peoples with the long view of relationships with places and land, a loss in court in the late-1980s, early-1990s is a blow, there's no question. But it's not the end of the story, it's the end of the story from the perspective of settler law. But it's just one strategy that didn't work and maybe even a galvanizer of redoubled efforts on behalf of what Sandy so rightly put was the relations and the obligations to those places. Not so much rights to them, but responsibilities for them. And when it's about your responsibilities for, yeah, that just sharpens, right?

Michael McNally ([00:16:11](#)):

Another thing that came up when Sandy, you were talking about responsibilities and obligations and relationships with everything. My favorite passage quoted in this book I think might have come from any number of people. But it came into focus for me when I heard Frank Ettawageshik from the Little Traverse band of Odawa in Michigan was talking about the court-protected treaty rights to fish in the Great Lakes. So, akin to the salmon, court-protected treaty rights to salmon in the Pacific Northwest or in Minnesota to wild rice harvests and access to fish and stuff. And the quote, I'm just going to read it, because it's brilliant, and I think goes to your point, is this, "Our ancestors made the treaties, didn't say, 'Those are our fish.' Rather, they reserved the right to fish. That meant they reserved the right to sing to the fish, to dance for the fish, to pray for the fish to catch and eat the fish, but to live with the fish, to have a relationship with the fish."

Michael McNally ([00:17:36](#)):

And so, that's in response to a treaty protected right that had gotten interpreted to a share of the take. And what that quote that I just read sounds really poetic, and it is poetic. But it's also super strategic, because it's saying that a treaty right to Lake Michigan Whitefish and Lake Trout is a right that the lake trout and the whitefish have to live healthy lives with healthy water and everything else. It's not an economic right to a percentage of the take or the harvest if the harvest has to be reduced because of pollution or what have you. It's arguably a treaty right of the fish. Which I think is, it could come up in a whole bunch of other contexts to, Sandy, your point. But it's one of those places where relationship gets kind of asserted in the arena of rights.

Sandy Bigtree (00:18:49):

Because the fish have their own system that they're responsible for as well. And we're talking about these interactions between systems. You have to respect them as we're all sharing life on this planet. So, if you think you can manage this system and control it, you're really interfering with that system's relationship with another system, with another system. I mean, it really plays out and is more disruptive than anyone really can comprehend. There's no way a human being can comprehend any of that.

Michael McNally (00:19:27):

And maybe you could say more about the Haudenosaunee context, but I know in the Anishinaabe context in Minnesota there are some Anishinaabe imaginative legal thinkers who say that when in the Treaty of 1837 or the Treaty of 1854, Ojibwe signatories said, "We reserve the right to hunt and fish and gather throughout our territories, not just on the reservation." What they were doing was making a stipulation that they had a treaty obligation to the wild rice, a treaty obligation to the northern pike, to the walleye that all those relationships were diplomatic in nature. And I just found that, find that to be a really powerful way of putting it. It's different than rights. Yeah.

Sandy Bigtree (00:20:22):

Definitely.

Philip P. Arnold (00:20:22):

Yeah, definitely. And maybe to bring it back to the Doctrine of Discovery a little bit, we're not talking about the doctrine of Christian discovery strictly as a kind of legal tenet that needs to be defeated in the Supreme Court or

something like that. That with these kind of insights into the relationality of all life, which is really what we're talking about. It's not just Native Americans that benefit from clean water and fish that are happy, or wild rice that requires the water to be pure. It's all human beings, it's all living beings. So, maybe the defeat to the Doctrine of Discovery then might come in more of these simple value systems that can be articulated best within something like water is life or something like that. So, outside of that political legal arena we're also engaging in issues around the Doctrine of Discovery. Sort of bring it back to the topic of our podcast a little bit, right?

Sandy Bigtree (00:21:48):

Well, in talking about the Doctrines of Discovery, you're always being held accountable to the sovereign, be it the Pope or these Christian monarchs. And everything had to transfer to them and increase their wealth. And to this day the Haudenosaunee used the word sovereign. There's sovereign people going back to pre-colonial times. They travel on their own passports to integrate into this system and just stay relevant in this world they're in. But their sovereign is the natural world. I have a friend, I'll read this very ... Such a wonderful writer, [inaudible 00:22:38]. He wrote, "The land is my sovereign, where I stand and or place my feet on the ground is my sovereign. I am the land, water, and sky. We are the same elements, structure and lasting ingredients. The land is my sovereign where I place my feet, and I refuse to give that away. I do not seed that familiar unrestrained."

Michael McNally (00:23:09):

It's a beautiful passage. This isn't about this book, but it goes back to my late Ojibwe teacher, Larry Claude Morgan, and he was a practicing Catholic. He described himself as a Catholic but not a Christian. Because he had a consistency between his ... I know it's a-

Jordan Loewen-Colón (00:23:34):

It's a jarring thing.

Sandy Bigtree (00:23:35):

Sorry for the face.

Jordan Loewen-Colón (00:23:36):

I'm trying to sort that out.



Michael McNally (00:23:41):

I wish you were here. I think what he meant by that, for him Catholic didn't mean the church. Catholic meant the mystery that the Catholic tradition, that the Protestant tradition had tried to paste into a flannel board and that the Catholic tradition had allowed to just be and not reduce it to words. That's what he meant by it. But Where I'm going with this is that he often spoke of the Ojibwe language word or one of the words to talk about the Creator is the owner of everything. And that language of Lord, we see that as only hierarchical. But I think if we were good medievalists, we'd probably see that it's a lot more complicated than just who has power over who. It's sort of like a, nobody ultimately owns things because all kind of deferred all the way up to the sovereign. But that changes in the time about the Doctrine of Discovery, where that's all kind of hardening right around a nation-state. And the head of a nation-state and the kind of the God part of that sort of disappears. I don't know if this part might be edited out.

Philip P. Arnold (00:25:07):

No, you're on the hook for that. Oh, look, it looks like Columbus is sailing into the harbor.

Michael McNally (00:25:24):

I'm going to take a picture of this.

Philip P. Arnold (00:25:24):

I'm not kidding.

Michael McNally (00:25:24):

There is a bark out there. Oh, my god. Right on cue. It's what? A Santa Maria.

Philip P. Arnold (00:25:43):

Santa Maria. Is this a first for the Doctrine of Discovery podcast, a first have a cheesy mock-up of Preston Burke, Columbus' sailing-vessel. Break it up. I think we've got a new logo for hour ahead of sled time.

Michael McNally (00:26:02):

Oh my goodness.

Philip P. Arnold (00:26:07):

So we got to see where it hooks up so we can go take a tour.

Sandy Bigtree (00:26:09):

Oh, dear me.

Michael McNally (00:26:11):

That is really funny.

Sandy Bigtree (00:26:12):

Three-hour tour.

Michael McNally (00:26:15):

I'm not sure this is relevant to anything, but there's been this uncanny thing with anytime I've mentioned my late Ojibwe teacher, there's always something really funny that happens or something really odd that happens.

Philip P. Arnold (00:26:28):

Is that right?

Michael McNally (00:26:29):

So, an example of that is, Inés Talamantez and I, or Ines asked me to join her when at an AAR we were asked to meet with the state heads of chaplains. Have you ever encountered that group that meets here?

Philip P. Arnold (00:26:48):

No.

Michael McNally (00:26:49):

It's the state officials who are in charge of chaplaincy and they're basically contractors for how chaplains work in corrections facilities and they're kind of the chief diversity officers. I was super nervous in this thing, because I don't have an experience of incarceration. I'm a white guy who doesn't know anybody who spent a lot of time in an incarcerated thing, except this Ojibwe teacher friend of mine who was in prison for a civil disobedience action. And so I walked into this room, I was super nervous. I was there to kind of support Inez, and we went around the room and introduced each other, and the person who was kind of the head [inaudible 00:27:34] of the group was the head of the federal chaplaincy.

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Michael McNally (00:27:36):

It was a woman religious, a Catholic nun who was kind of kick-ass. She said after it got to me and I said, "I'm Michael McNally. I teach at Carleton College. I really don't have a lot of experiences with religious freedom in the prisons personally, but my late Ojibwe teacher was an inmate in Terre Haute for a civil disobedience action with a nuclear missile silo, broke into a nuclear missile silo within earshot of a school in Kansas City."

Philip P. Arnold (00:28:12):

Holy crap.

Michael McNally (00:28:14):

I'm interrupted. And this woman says, the person who's the head of federal chaplaincy, she said, "Larry Cloud Morgan, he's your mentor?" And she said, "He was my mentor in my first job as a chaplain at Terre Haute Federal Penitentiary." So, it was one of those things where it just came up.

Philip P. Arnold (00:28:36):

Anyway, so that kind of stuff happens when you're talking about your mentor.

Michael McNally (00:28:42):

It happens. It's so funny.

Philip P. Arnold (00:28:43):

Columbus shows up.

Michael McNally (00:28:44):

Columbus just as a utter and complete joke, right?

Philip P. Arnold (00:28:48):

Oh my gosh.

Sandy Bigtree (00:28:50):

Too funny.

Philip P. Arnold (00:28:52):

We got to go on that boat.

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Michael McNally (00:28:55):

You do have to go On that boat. I think the Henry Luce Foundation should purchase that boat.

Philip P. Arnold (00:29:02):

Yeah, right now we definitely need to do a tour. Of course, it might be the Mayflower.

Michael McNally (00:29:07):

It could be that. Well, that works too, doesn't it? It's a friendly amendment.

Sandy Bigtree (00:29:10):

Yes. I would say.

Jordan Loewen-Colón (00:29:14):

Do you need help catching up on today's topic or do you want to learn more about the resources mentioned? If so, please check our website at [podcast.doctrineofdiscovery.org](http://podcast.doctrineofdiscovery.org) for more information. And if you like this episode, review it on Apple, Spotify or wherever you listen to podcasts. And now, back to the conversation.

Michael McNally (00:29:33):

So getting back to the Doctrine of Discovery for real, one of the ways that comes into the book is in the first chapter, in the first chapter of this book, like most books is usually you're trying to provide historical context or whatever it is before the real work in the book gets going.

Michael McNally (00:29:53):

But this first chapter kind of became its own book, and the Doctrine of Discovery was Exhibit A. And so, I talk about the different registers of religion in the book. And the first chapter is called Religion as Weapon, and it's about the Doctrine of Discovery.

Philip P. Arnold (00:30:14):

Exactly.

Michael McNally (00:30:15):

And the civilization regulations of assimilation policy in the 1880s. And so the fact that native peoples were determined to be without religion and therefore had no rightful absolute title to the land and et cetera, et cetera. I was kind of trying to set up why would Native peoples have anything to do with this concept, even if it's legally powerful, why would you even care about it? Because it's so shot through with colonialism, and of course the assimilation policy civilization regulations from 1883 to 1934 are an update to that doctrine discovery policy that authorizes atrocity, religious violence. Just to reiterate what those are, between 1883 and 1934, certain ceremonial practices like the Sundance and the funeral potlatch are singled out and criminalized. And later regulations suggest certain fines or periods of incarceration for people found practicing these traditions.

Michael McNally ([00:31:34](#)):

They single out the practices of medicinal healing or ceremonial healing. And every American should know that this happened on the watch of a nation that was otherwise committed to religious freedom. It's jarring, right? I mean, I don't have to tell you. And more than 50 years as a formal policy didn't really end with the formal ending of it. And that's why the 1978 American Indian Religious Freedom Act had to affirmatively say that government policies continue to have the effects of sanctioning native religion and ceremony, even if they're not intended to. Because in 1934, the formal policy was shut down, and I believe it was at that time they started calling them the Religious crimes code.

Michael McNally ([00:32:41](#)):

I think that is such an important thing to really reckon with, and not just to reckon with in a kind of thin way, but to actually get down into the weeds of how that was enforced in various reservation contexts around the country. Because it is huge. The Oak Flat case in Arizona, which hopefully we can spend some time talking about, emerges in the context of the civilization regulations. And at the San Carlos Apache Reservation, which is the closest reservation to Oak Flat, the part of the civilization regulations is not just the criminalization of the ceremonial practices, but it's also the policing of the boundaries of the reservation so that people, they don't have the freedom of movement to go to their sacred places. And places like Oak Flat, were not only off the reservation, but I can't remember exactly the date, but there's a general Sherman's order that, excuse me, general

Crook's order that anybody found at Oak Flat or other places off of the San Carlos reservation could be subject to death by military patrols, because.

Sandy Bigtree (00:34:18):

Absolutely.

Michael McNally (00:34:19):

So that's a death sentence for practicing your religion. Going back to traditional places, there are a number of clans that have their origins in and around Oak flat. There's springs that need to be visited. There's a whole host of practices that were related to that, and that was, yeah.

Sandy Bigtree (00:34:44):

The U.S. government, I don't think really cares much about that. And I think a lot of the tribal governments that have been created by the United States have through history, not really been protective of that either. Because they've lost their culture through having gone through the boarding school situation. It's those original treaties that hold the weight. Because we're talking about how we're going to live together and protect our territory, protect your territory, and live along the river of life and respecting the natural world. All these other, I mean, Suzanne got in there. She also was involved in the Indian Child Welfare Act. She was very active in jumping into this court of law of the United States to try to make them behave. Those laws and the amendments are more so that the United States behaves within their own legal construct. They're not really writing those for native people.

Sandy Bigtree (00:35:52):

I think all those amendments are trying to reveal something to this government. Because Who gives you the authority to write any kind of dictate on how we're going to live beyond our original treaties? Anything else has been a way of manipulating their way out of those obligations, including establishing the BIA puppet regime. I worked at NARF. I was auditing some, one law class with Charles Wilkinson. He was laying it out the first day. There are three areas of law. There's federal law, there's state law, and then there's federal Indian law. And my jaw hit the floor. I'm going, "No, that's not what the treaties were about." And then he went on to say, "Federal Indian law is under the guardianship of the United States." And at that point I just got up and left the room and never returned, because no,

that's a manipulation of these original agreements between the federal government and Indian treaties, Indian nations. So It's just been a ruse to complicate everything. And now it's the way of life now. It's the world we're living in total chaos.

Philip P. Arnold (00:37:16):

And really almost beyond that, what gives anyone the right to keep people from performing or to fulfilling their original instructions to not letting them go to their sacred places? Who thought that up? I mean, or it could say, what's the risk? What's at stake there? I mean, it's absurd that the American Indian Religious Freedom Act was passed in '78, it seems when I tell my students that that's ancient history to them. But that's not long ago.

Michael McNally (00:38:09):

That's right.

Philip P. Arnold (00:38:14):

And so I have a lot of Haudenosaunee kids in my class. Not a lot, but we'll say 10, 12 out of class of 45 or so in my indigenous religions. And one of the things we do all semester long is try to interrogate that idea of what is authentic religion? What does it mean? And some smart Mohawk kids, very smart kid, was saying, "We can't buy into that religion argument." So that's the problem. So we reading parts of my book, the values. So I try to insert values as a way to think about a larger context outside of religion. And he was saying, we should go that direction rather than the religion direction. But I think you're quite right. We need to pick and choose on what sort of field we're going to deploy these different categories. And The more we have, the better it is.

Michael McNally (00:39:22):

Yeah. The thing about religion is that it's definitely a settler-colonial word, but it's a powerful settler-colonial word. Because it is in the Constitution. And even those who come from a conservative Christian viewpoint, some of those folks elevate the religion clauses of the First Amendment as the most important according to this. They're the first words of the Bill of Rights for a reason, because it's the ultimate check on the power of the state, the obligation or the belief or the faith in a supreme being that's higher than the state. So, it's sort of a strategic case for religion. But what Sandy said is so right on, that introducing religion, especially as it's played out in the law,

supposedly applies to everybody. And citizens of sovereign Native Nations are not just anybody practicing as individuals they're rights to religion. These are collective, they're collectivities with sovereign rights. And that is a place where the language of religion has been-

Sandy Bigtree (00:40:56):

Or, sovereign responsibilities.

Michael McNally (00:40:57):

Sovereign responsibilities. Thank you. Yes.

Sandy Bigtree (00:41:00):

Okay.

Michael McNally (00:41:01):

Correction, is you're absolutely right. Yep. And what's interesting when you get into the weeds of the American Indian Religious Freedom Act, and particularly the 1994 amendment to the American Indian Religious Freedom Act, which safeguards the right to ceremonial use of peyote by citizens of Native Nations, that's how it kind of goes down. The American Indian Religious Freedom Act by the courts has been seen as only a resolution of Congress to direct to mandate federal agencies to comply. That's what the courts have said, right? That it doesn't have legal teeth.

Michael McNally (00:41:48):

And Suzan Harjo, who was part of that movement is like, "Well, of course it didn't have legal teeth. We knew it didn't have legal teeth, but we knew that it was important to have a declaration by the U.S. government that it had screwed up, even when it didn't expressly mean to." And that the acknowledgment of federal actions that had inhibited or prohibited native religious exercise was important in the first instance. But in 1994, after the religious practices of 40,000 or so, practitioners of the Peyote way were criminalized in the 1990 Employment Division v. Smith case after they had using religious freedom language, one cases in the court to protect the sort of bona fide religious nature of the Peyote way. When that Supreme Court decision criminalized Peyote, an almost unanimous Congress from the left and from the right came together to write the Religious Freedom Restoration Act, which restored religious freedom rights through statute,



that the court at that time had so narrowed that Congress said the courts had lost touch.

Michael McNally (00:43:22):

Anyway, to make a long story short, native peoples were not part of that religious Freedom Restoration Act coalition. They weren't invited and they didn't want them there because the point was not to sanction Peyote in the Religious Freedom Restoration Act. And from what I understand from interviews with Suzan Harjo is that they got together, these leaders and thinkers. It included Walter Echo-Hawk from NARF and other Steve Moore from NARF, the lawyers there. And they decided that they would get Congress to pass an amendment to the native specific Religious Freedom Act, the American Indian Religious Freedom Act, and give it legal teeth. And they were able to do that. And I think that's amazing, what they, in my view, do there is not just say, "Here is American Indian version of the religious freedom rights of everybody else, but it's because it's hardwired into the treaty-based political sovereignty of Native Nations and their members.

Michael McNally (00:44:39):

They get the protection for use of Peyote tied to citizenship in Native Nations. Now, that invites the whole recognition process, which is colonial and so forth. But it does put ... It's not sort of just religion as everybody seems to understand it. It's kind of a collective recognition of collective rights and responsibilities to religion that are secured there. And something like that I think happens also in the Native American Graves Protection and Repatriation Act where it's tribes and members of tribes, as I'm using the word tribe, because that's the language in the act.

Sandy Bigtree (00:45:36):

Of course.

Michael McNally (00:45:37):

It's sovereign nations.

Philip P. Arnold (00:45:39):

But yeah, you're reminding me of our colleague Houston Smith's role in the Native American church, right? Him working together with Reuben Snake, a road man, and writing One Nation Under God, which had a profound

effect in that reversal of the U.S. Supreme Court. One of the things that Houston always talks about or talked about at the time, was that there was such a broad base coalition of really Christian denominations across the board that supported in amicus briefs or whatever it was, their petition to the U.S. Supreme Court to overturn the criminalization of Peyote or the Native American church, that it was religion as a kind of unified front that pushed against that. Because the idea was, well, if Native American church can lose their standing, it could happen to anybody. So I don't know if that was a moment, I don't know-

Sandy Bigtree (00:47:03):

But who's determining it? The United States, again, acting as the guardian over Indian nations and what's held sacred. This is really not defending the sacred, it's trying to fit indigenous nations in some kind of loophole where they can smoke Peyote or it's really kind of a backdoor approach rather than just honoring the treaties, which is also the supreme court of the land according to the Constitution. So why are we even moving forward? Why is the U.S. criminalizing native people for smoking Peyote if that's their tradition? I don't even know how this comes about. And I worked at NARF for a short while. Like I said, I had problems with that, because they work in that system where the U.S. is the guardian of Native Nations. And they work with the tribal chiefs that are recognized by the United States who have gone through the boarding school system, and have pretty much have their culture erased from them.

Sandy Bigtree (00:48:18):

Growing up, I always assumed, because up at Akwesasne, we have a BIA government as well, and I also know there are traditional people up there, but I grew up in the city of Syracuse. So in my heart, I believe the tribal government was protecting the traditional people. But that is not the case because these elective systems were foreign. They were new. They disrupted everything in those territories and silenced the voices of traditional people. And that's what's happened cross-board throughout history. And so, if these laws are being refined through NARF, they're working with these tribal governments who are not the ceremonial leaders in those territories. They're recognized by the United States of being interlopers and to get at resources or put in pipelines. They weren't the ones, the tribal leaders were not the ones out there demonstrating at Standing Rock, I can assure you.

Michael McNally (00:49:30):

Well, wouldn't that be like, maybe that's true of many. Maybe it's even true of most, but to the degree that at least some nations have revised their constitutions and tried to be at work on the colonial nature of the BIA history and the earlier constitutions that they had, I'm not arguing-

Sandy Bigtree (00:49:57):

For one thing. We had indigenous forms of democracy all over the Americas that had systems of bringing people in agreement, forming a consensus among the people. We didn't vote, Onondaga. The Haudenosaunee do not vote within their clan structure. When the United States imposed these BIA governments all over the country, they first of all establish the church before the BIA government, establish the patriarchy. And then the government established these voting systems, which is really quite divisive. It's not a unifying venture as we see today. It's pretty violent and divides families and friends, and I don't know how it's going to heal working with these federally imposed systems of domination all over the Americas. And working in this court of law when this is not how indigenous people operated. They didn't operate under law. Like I said, it was under relational systems that sustain each other, the waters, the air, all of it. So it's really problematic to work in law and think we're going to resolve this disconnect between what's sacred and what's religion.

Philip P. Arnold (00:51:32):

I think that's-

Sandy Bigtree (00:51:32):

So, it's really problematic, but we all need to be talking about it. So it's really, it's time we have to be talking about where are we going, where are we going to continue, what on this path? Really?

Philip P. Arnold (00:51:48):

I think that's what the Mohawk student was saying essentially. And as you know, we've had, you've been a guest in an Onondaga nation territory and we've introduced you their legal counsel and Tana Daho and everything. And being in Onondaga Nation territory is quite fundamentally different, which is what Sandy's talking about. That is they are federally recognized. They are one of the 574 native tribal nations we'll say, that are federally recognized, but they are not ... What?

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Jordan Loewen-Colón (00:52:35):

Can you move your microphone down a little? Because every time you scratch your neck, all I hear is you scratching.

Sandy Bigtree (00:52:44):

Oh, no, you're scratching your neck.

Philip P. Arnold (00:52:45):

I'll try to keep my-

Michael McNally (00:52:48):

So take it from the top with Onondaga Nation, because I think that's important.

Philip P. Arnold (00:52:53):

As we know, Onondaga Nation is federally recognized, one of the 574 federally recognized Native American nations, but it's one of only three that have not accepted the Bureau of Indian Affairs government on their territory, the IAEA government. So that means they're still governed by their clan, matrilineal clan system that's been present for thousands of years.

Sandy Bigtree (00:53:25):

It's not by the measure of blood. It's through the matrilineal clanship.

Philip P. Arnold (00:53:35):

Through the mother.

Sandy Bigtree (00:53:36):

Through the mother. So very different. And they don't hold BIA cards.

Philip P. Arnold (00:53:41):

And they have been very active internationally as we know. But there have been a lot of Native nations who have accepted BIA governments that are very interested in how they managed to do that. They have, they've been consultants to other, as you were saying, Michael, that other governments have been wondering, well, how do we get out of this? How do we more embrace those original instructions and let those be our guide for the

governance of our territories? So I think there is a kind of movement to unwind those, kind of domineering systems in some way, at least among some native leaders.

Sandy Bigtree (00:54:42):

Then we have some native people who say, "It wasn't until 1924 that we became citizens of the United States." Well, the Onondaga, who's the capital of the Haudenosaunee, they went to Washington D.C. and said, "We do not accept this. This could be interpreted some said as an act of war, because if we are you, then our treaties become null and void. You don't have a treaty with yourself.

Philip P. Arnold (00:55:14):

They've always taken that hard line. And one of the consequences of that, just in September, was the return of a thousand acres of land. Really the largest return of land to any native nation in the United States. And they insisted that it would not be held in trust. Because there is no trust, I guess, but then it would be not encumbered in any way. It was a gift and it had no relationship to the state ever again, right?

Michael McNally (00:55:59):

Wow.

Philip P. Arnold (00:56:00):

So they managed to pull that off, and I think it had to do with them sticking to their values, the values of the great law peace. And I think other Native Nations are looking at this and going, maybe the legal pathway is not really the best.

Michael McNally (00:56:26):

Yeah.

Sandy Bigtree (00:56:26):

Well, there's very strong medicine societies at Onondaga, very rigorous ceremonial cycle every month for medicines and leaders of different species of life that we interact with. That's their main focus.

Philip P. Arnold (00:56:44):

And the reintroduction, as we talked about, of the brook trout, which is native to our area of the country.

Michael McNally (00:56:56):

Yeah. Well, it's also so instructive that the Haudenosaunee were the sort of original native set of nations to go to international law. As international law started to come into focus in the early 20th century with the League of Nations. And I think it's important to make sure that this conversation doesn't sort of stop with federal Indian law. And because I agree completely with you that nothing is going to be resolved through something that's so tilted against sovereignty. So for sure that the UN declaration, the final chapter of this book, and what I suppose I have the most hope for and the least ability to speak about is the possibilities of the UN declaration and the rights of indigenous peoples as at least a beginning step in clarifying how the scenario among Native nations in the United States should go, going forward. And one of the things that I speak about in the book is that to this definitional problem, the word religion appears there a couple of times, but it's not a power word in the UN declaration in the way that it is in the United States Constitution.

Philip P. Arnold (00:58:39):

Oh, that's a good point. That's a good point.

Michael McNally (00:58:40):

But the whole declaration, all 46 articles, are shot through with references to spiritual relationships, to the sacred really. And Article 25 for me clarifies that land rights among other things, land rights are not just sort of political or economic rights, but they're also rights to a spiritual relationship, and the ability to maintain and strengthen spiritual relationships and obligations to future generations of those. It's a beautiful beautifully put article, and I would love to talk to your interlocutors in Onondaga that were part of that process to find out how did Article XXV come about, because it's kind of a preamble to a series of articles that are about land rights. But it sort of starts on a different foundation than Western property systems. And because of that, it also includes ongoing affirmation of human rights, indigenous human rights to relationships with lands that are traditional lands and waters that are traditional.

Michael McNally (00:59:55):

But where that nation may not control those lands anymore, which in Minnesota is very poignant in the part of Minnesota where we are, because the Dakota were formally exiled in 1863 from their lands in Minnesota, and all the treaty, the treaty rights of the Treaty of 1837. And the Treaty of 1851 were abrogated and all those annuities were steered toward settlers who had been "The victims" of the anti-colonial resistance that some, not all Dakota people put when they were starving because the U.S. wasn't paying its treaty obligations.

Michael McNally (01:00:41):

So the fact that there is a right to an ongoing relationship to those lands, even ones that are in private ownership, is huge.

Philip P. Arnold (01:00:53):

I mean, of course, you know that it was behind, according to the engine, behind the UN Declaration on Indigenous ... Sorry, UN declaration on the rights of indigenous Peoples was Tonya Gunilla-Fritzner who was on the [inaudible 01:01:12] Clan and the executive director of the American India Law Alliance at the time. And just immediately before that, this is kind of a footnote, but immediately before that, the Onondaga Nation filed their land rights action in federal court. And the preamble for that is that the Land Rights Action was really focused on the rights of the land, not a land claims, which would be a kind of shift in who owns the properties. But rather are the recognition that the land has been mistreated in so many ways, and that the Onondaga are looking for recognition that this is their traditional territory, about two and a half million acres right through New York State. And that they need to be at the table in decisions that are being made on behalf of the land and the beings that inhabit those lands.

Philip P. Arnold (01:02:20):

So, they were operating with this, again, they were operating at the level of, water is life. That same kind of resonance that so many people in our area just thought, "Yeah, I'm on board." And that's where we started doing programming with neighbors of the Onondaga Nation or Noon SU got involved, and now it's 20 years on, and we're going to have another round of these retrospective in where we've come since. But anyway, so there is a kind of legacy there. That's yeah.

Sandy Bigtree (01:03:07):

Right. But at Onondaga, the traditional voice has the political clout in the international stage. Because they're recognized. How do we empower all the traditional voices all over the Americas when the tribal governments are not that voice. They're working in consort with the United States and negotiating all the time and receiving funds from the United States. The traditional people would not be doing that because there's too much at stake with what they know about living as human beings on this earth. So many of them don't vote. I know they don't vote among the hood and Ashoni traditional people will not partake of a foreign entity that's been forced on them, a system of voting. It's nothing they ever did before. It's a consensus breaking rather than building. So there are still traditional people all over the Americas. How do we strengthen those voices? They were trying to do that at Standing Rock, but they had no real political clout because the BIA government there was really in control, and it was through embarrassing their own leadership. But it's dangerous too to get up and demonstrate like that. There's a lot at stake.

Philip P. Arnold (01:04:39):

Well, there are a lot of people that were thrown in jail, for sure. There's still-

Sandy Bigtree (01:04:41):

Absolutely.

Philip P. Arnold (01:04:41):

... working a lot of those out.

Sandy Bigtree (01:04:43):

And we won't mention Wounded Knee and what happened in the early days.

Philip P. Arnold (01:04:50):

But I do think, like Michael was saying, I do think they were to a large degree successful in a way, they kind of won the ... I wouldn't want to reduce it to PR, but they really did galvanize a kind of global attention because of-

Sandy Bigtree (01:05:06):

Oh, absolutely.



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Philip P. Arnold (01:05:09):

... the simplicity of their message. And it's very similar to what Anandag was doing in 2005 just before UNDRIP was voted on in 2007. So I think that there is a kind of lineage there that could be unpacked, and I hadn't thought of it before, before you mentioned it.

Michael McNally (01:05:32):

Yeah.

Sandy Bigtree (01:05:32):

And they also had allyship. There were a lot of non-native people that were going out there standing with them. So maybe that's what I'm trying to get across.

Philip P. Arnold (01:05:41):

Yes-

Sandy Bigtree (01:05:41):

We need to support those voices.

Philip P. Arnold (01:05:42):

... that Standing Rock as well as The [inaudible 01:05:46] rights, actually.

Michael McNally (01:05:46):

Yeah. One of the things that the UN declaration in the space of religious rights to religious freedom or the rights to responsibility, the freedom to continue to follow original instructions or to fulfill your obligations to all your relations. One of the ways that goes down in the UN declaration that's worth a shout-out here is that a power word, as you know, is free prior and informed consent. So the declaration recognizes the sort of at its best, United States law calls inherent sovereignty, but the rights to people hood of indigenous peoples, and with that, the rights to free prior and informed consent to actions development, et cetera, that happens on their traditional territories and waters with impacts to their relations as we've been speaking. And that's a really important and powerful corrective to the world that, Sandy, you're criticizing that is in this book that I'm talking about a lot. The world of just consultation, which can be done to varying degrees, but there's a standard of consultation that the United States holds itself to,

though it's differentially enforced and inhabited by different agencies and et cetera, et cetera.

Michael McNally (01:07:35):

But there's a difference between consultation, being able to say, you consulted with the Native Nations and what that might look like if the standard were free prior and informed consent. And at least as I understand it, the irrational fear of that language on the part of the United States or other states, member states of the UN, is that it's a veto power to doing anything within the territory of the United States. And that seems kind of irrational, because what the sovereign nations are saying is they want to be respected and be at the table, right?

Philip P. Arnold (01:08:18):

Exactly.

Michael McNally (01:08:20):

And so, they may or may not be pushing, they might veto something that's really matters to them, but they might have another position, but just respect their sovereignty in their ability to speak from their sovereign position. It's that irrational fear that, and that's part of the problem with the sacred claim, the sacred land protection stuff, the slippery slope fear of judges that, well, if we grant this case at Oak Flat or whatever, then everybody's going to claim it. And that's kind of the language of religion. But the language of representing or respecting people-hood and sovereignty is a respect for other people to be at the table and say what their priorities are, to give them full respect that they might approach it diplomatically, not just as they're going to veto absolutely everything that has anything to do with their traditional territories.

Philip P. Arnold (01:09:30):

After all, they know their territories better than anyone.

Michael McNally (01:09:34):

Yeah.

Philip P. Arnold (01:09:36):

So, let me take a pause here and ask, is there anything else that you want to talk about, or do you want to get to something or?

Michael McNally (01:09:45):

Well, the one thing I do want to say, and I'm not sure how long it takes for the post-production of your broadcasts, we're all looking over to Adam and grateful for the work that goes into that. I have to say, I've not listened to every one of your podcasts, but I really appreciate them.

Sandy Bigtree (01:10:07):

Thank you.

Michael McNally (01:10:11):

So good work. But the one thing that I do want to say is that this is an interesting moment to be having this conversation because in the Oak Flat case, the losses in court for a religious freedom right to sacred place protection for native peoples just got kind of amped up by the Ninth Circuit, which is in a way the most powerful of the circuit courts of appeal in the federal court system. And because it was such a convoluted and complex decision, there was a six five majority and then a descent, which was also six people. So there's overlapping descent. It's the most, I can't even describe to you how complicated this thing is. There were seven different decisions 11 judges and seven different decisions, concurring opinion with this and that. It's just completely obfuscatory. And because of that, and also because this particular conservative Supreme Court might be looking for bona fides for its own respectability on religious freedom issues, that religious freedom is not just going to protect majority Christians with a particular kind of angle of Christianity.

Michael McNally (01:11:43):

There is a chance that the Oak flat case gets taken up by the Supreme Court, and if it does get taken up, I don't think the answer is that it's dead on arrival. Honestly, because kind of through the back door, because Justice Gorsuch and Justice Roberts, and maybe some of the other conservatives are keen to make sure that they have some respectability, especially in this Trump moment. I think there's a chance maybe that's way too much faith that the courts are going to recognize a right to religious freedom on native sacred place protections. I mean, the facts there are breathtaking, right? The copper mine is going to completely, it's going to create a crater about the size of a meteor crater in the sacred terrain, that's not disputed factually. And yet, somehow still the courts are saying that

there's no substantial burden, to use the term of art, on the religious exercise of native peoples when it's going to destroy, the sacred place.

Michael McNally (01:13:03):

So who knows, maybe at some point this ... Maybe there's a surprise in it. I'm looking at some pretty skeptical faces here that the U.S. courts would ever do anything. But maybe in this instance there's a little bit of a victory through the back door that might make a huge difference, even if it's not a resolution to the issues that we're talking about, but might really change the nature of the way that sovereign nations could negotiate their priorities.

Philip P. Arnold (01:13:41):

Well, I hope you're right. That would certainly be a monumental decision. But I have my doubts, but especially in this moment where I think we're really, because we're not in the moment of Native American Church or 1994. We're in the moment of what, 30 years later and kind of the rise of white Christian nationalism. And we have several of those on the court. So I hope that they can see that this is a religious issue that might have something to do with them and their traditions, but.

Sandy Bigtree (01:14:34):

Well, that's a good place to end this session, I think. Just a little bit of hope. Yeah, that's all we can do right now next few months.

Michael McNally (01:14:51):

But again, a loss in court isn't ever the end of the story for people who have the long view. And the Dakota folks that at Prairie Island that I work with, say we've been here 10,000 years, the last 200 years of the Doctrine of Discovery, as it's been actually felt by them in Minnesota, beginning in the early 18 hundreds, late 17 hundreds. It's a blip in the 10,000-year map, and they have every expectation that they're still going to be here.

Philip P. Arnold (01:15:22):

That I think is correct. Right, it's just a blip, and it's one that, well Americans in their idea, they're kind of triumphal narrative about ourselves as Americans. We tend to celebrate. But it's true in the long way of the place itself of the land itself. There is a future. So, even if it's not with us in it.

Sandy Bigtree (01:15:59):

Okay.

Michael McNally (01:16:04):

Let's get back on that sailing ship out in the harbor.

Philip P. Arnold (01:16:07):

Of course, we'll take a trip.

Sandy Bigtree (01:16:07):

Turn it around.

Philip P. Arnold (01:16:07):

Take a trip.

Sandy Bigtree (01:16:07):

Get out of here for vacation or something.

Michael McNally (01:16:15):

Thanks for the opportunity.

Philip P. Arnold (01:16:16):

Well, thank you-

Michael McNally (01:16:16):

Appreciate it.

Philip P. Arnold (01:16:17):

... Michael. This has been great. I knew it would be, and I know we'll work together on many of these things going forward.

Michael McNally (01:16:26):

I hope so. All right.

Sandy Bigtree (01:16:27):

Definitely.

Michael McNally (01:16:28):

Yeah. [inaudible 01:16:29], thanks.

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Jordan Loewen-Colón (01:16:30):

The producers of this podcast were Adam DJ Brett and Jordan [inaudible 01:16:34]. Our intro and outro is social dancing music by Oris Edwards in Regis Cook. This podcast is funded in collaboration with the Henry Luce Foundation, Syracuse University, and Hendricks Chapel, and the Indigenous Values Initiative. If you like this episode, please check out our website, and make sure to subscribe.